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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 390

WADE KITCHENS ..... *Petitioner*

vs.

MRS. MARY BIRD, ET AL ..... *Respondents*

RESPONDENTS' BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

1. There was no denial of due process of law or any right guaranteed by the Fourteenth Amendment. Therefore, the right to a review by certiorari under Section 234, Sub. Par. B of the Judicial Code does not exist. The right to review a decision of a State Supreme Court by certiorari is governed now by Title 28, United States Code, Sec. 1257 (3).

2. No question involving any right under the Federal Constitution was raised in this case, by the pleadings, or under the evidence during the trial. No federal question was involved.

3. No right was claimed under the Fourteenth Amendment until after the case had been reversed by the State Supreme Court. The question was raised for the first time in a petition for rehearing. This question was not raised in time.

4. This was a suit in the Chancery Court, in which petitioner was seeking equitable relief. The right to such relief depended primarily on petitioner being able to prove a partnership, or a fiduciary relationship with the defendant, and, to excuse his own lack of diligence in failing to take advantage of the right to redeem which the State statute afforded him.

5. The State statutes, about which petitioner now complains would have operated for his benefit, if he had taken advantage of them, and were not detrimental as he now contends.

6. There was no lack of due process of law in this proceeding. There was a decided difference of opinion as to the inferences to be drawn from the evidence, and the petitioner is now dissatisfied with the Supreme Court's conclusions of law, just as the respondent was dissatisfied with the conclusions of law made by the trial court.

7. Petitioner has listed six "reasons relied upon for allowance of the Writ." These reasons can be refuted by

brief explanations which are here numbered in order as presented by petitioner:

(1) The decision of the Supreme Court of Arkansas did not direct that title be quieted to lands of petitioner "which were not actually sold at the Execution Sale." The case was remanded for further proceedings and with directions "to quiet appellants title to all the lands sold at the execution sale and described in the Sheriff's deed in which Wilson and appellee Kitchens, had any interest." (R. 161)

(2) The judgment and decision of the Supreme Court of Arkansas did not cut off petitioners equity of redemption. The statutory time for redemption, one year, had already expired when petitioner filed this suit. The Supreme Court merely denied petitioner the right to redeem after he had failed to exercise that right during the statutory period.

(3) Petitioner is mistaken in asserting that there was no judgment in existence at the time the lands were sold at the execution sale. The judgment was not satisfied under the agreement between J. B. Wilson and the judgment creditorR. S. Warnock. (R. 41) The sum of $2,500.00 was paid and credited on the judgment. The balance of $7,000.00 was paid, according to the agreement, within fifteen days after the sale. Part of the money, $5,000.00, was supplied by an outsider, Shep Beene, and the judgment was assigned to him.

(4) The statement that the statutes of Arkansas,

relating to Execution Sales, do not provide for proper notice and levy as a prerequisite to the validity of the sale, is refuted by the very statutes referred to by petitioner himself.

Section 30-401 (Arkansas Statutes of 1947) provides that the person against whom an execution is issued may select what property shall be sold to satisfy it.

Section 30-404, provides how the sheriff may make a levy on real estate.

Section 30-417, provides for posting notice, of the sale of real estate, on the property, and publication of the notice in a newspaper in the County.

(5) It is not an accurate statement, by petitioner, to say that the decision of the Supreme Court of Arkansas takes from petitioner his lands and gives them to respondent. The execution sale itself constituted due process, and the Supreme Court of Arkansas held that the process was legal, the decision of the Court took nothing from the petitioner. It is not an accurate statement to say that the purchaser at the execution sale paid no consideration and gave no money, and the debtor obtained no benefit. Actually, the lands were sold at the execution sale for $4,500.00, which was paid either to Warnock, or to Shep Beene as the assignee of the judgment. The Sheriff testified that it was paid, or he would not have executed the deeds.

(6) The statement that petitioners property was taken without due process by the decision of the Supreme Court of Arkansas, because none of the normal and prescribed procedure was followed in conducting the execution sale, is a broad statement of an unsupported conclusion.

II.

STATE STATUTES INVOLVED

(Reference is to Arkansas Statutes of 1947)

SECTION 30-401. SELECTION OF PROPERTY TO BE SOLD — LEVY — The person against whom any execution may be issued may select what property, real or personal, shall be sold to satisfy the same; and if he give to the officer a list of the property so selected, sufficient to satisfy such execution, the officer shall levy upon such property and no other, if it be sufficient in his opinion to satisfy such execution, and if not, then upon such additional property as shall be sufficient.

SECTION 30-417. NOTICE OF SALE OF REAL AND PERSONAL PROPERTY — ADVERTISEMENT. The time and place of sale of real property upon execution or by virtue of a judgment, or order of sale, must be advertised for at least twenty (20) days, next before the date of sale, by posting printed advertisements at the courthouse door and five (5) other public places in the county in which the sale is to be made, one of which is to be upon the premises to be sold, and by publishing the same for at least two (2) insertions, before the day of sale, in a weekly newspaper published in the county, if

one there be. The time and place of sale of personal property shall be advertised by posting written or printed notices at three (3) of the most public places in the vicinity of the place of sale.

SECTION 30-419. TIME AND MODE OF SALE. — All property taken in execution by any officer, shall be exposed to sale on the day for which it was advertised, between the hours of nine o'clock in the forenoon and three o'clock in the afternoon, publicly, by auction, for ready money, and the highest bidder shall be the purchaser.

SECTION 30-421 — DIVISION OF REAL ESTATE INTO TRACTS — In all sales of real estate, under execution, when the tract or tracts to be sold contain more than forty (40) acres, the same shall be divided, as the owner or owners may direct, into lots containing not more than forty (40) nor less than twenty (20) acres, and the officer whose duty it may be to sell said property, shall begin at one corner of said real estate, to be designated in the notice published by him advertising said sale, and proceed to sell in such tracts of not more than forty (40) nor less than twenty (20) acres each, of contiguous territory, unless the whole of said tract or tracts be disposed of, unless the execution shall be sooner satisfied.

SECTION 30-439 — CERTIFICATE OF SALE GIVEN PURCHASER BY SHERIFF — RETURN OF DUPLICATE. — The sheriff shall give the purchaser of any real property, sold upon execution, a certificate of sale, in which the property sold shall be described, and the price for which it is sold stated. Such certificate shall be evidence of the purchase at the price stated, and the officer

shall return a duplicate thereof with the execution. No conveyance shall be made to the purchaser, nor the possession delivered to him, until the time for redeeming has expired; and, if said property is redeemed by the defendant, as provided in this chapter the sale and certificate of purchase shall be null and void.

SECTION 30-440. TIME OF REDEMPTION OF REAL ESTATE — When any real estate or any interest therein is sold under execution, the same may be redeemed by the debtor from the purchaser or his vendees, or the personal representatives of either, within twelve (12) months thereafter.

SECTION 30-441. MANNER OF MAKING REDEMPTION — The debtor may, at any time within twelve (12) months, pay to the clerk of the court, where the execution issued, the purchase money with fifteen (15) percent per annum, and all lawful charges, and take his receipt therefor; such money shall be held by the clerk for the use of the purchaser, and he shall be responsible upon his official bond therefor. Such clerk shall indorse upon the execution book that such redemption has been made.

SECTION 30-445. CONVEYANCE BY SHERIFF — RIGHT TO POSSESSION. — After the time for redemption has expired, the sheriff, or his successor shall convey by deed the property sold under the provisions of this title to the person entitled thereto. Upon which, such grantee, if possession is not delivered within ten (10) days, may proceed, by forcible detainer, to be put in possession thereof.

SECTION 30-477. CONTENTS OF DEED. — The officer (who shall sell any real estate, or lease of lands for more than three years), shall make the purchaser a deed, to be paid for by the purchaser, reciting the names of the parties to the execution, the date when issued, the date of the judgment, order or decree, and other particulars as recited in the execution; also a description of the time, place and manner of sale; which recital shall be received in evidence of the facts therein stated.

III.

THE CONSTITUTIONAL QUESTION WAS NOT RAISED IN TIME AS TO SOME OF THE POINTS RELIED UPON BY PETITIONER

Some of the points relied upon by petitioner, while they do not appear to have any merit as a basis for review by certiorari, could not have been raised until after the decision by the Supreme Court of Arkansas, but other points clearly should have been raised during the trial, and, having been raised for the first time in the Petition for Rehearing, were raised too late. For instance:

> In Point 3 the alleged non-existence of a judgment is made the basis of a claim that petitioner's property was taken without due process by virtue of the execution sale. This contention was not argued or presented during the trial and is therefore now raised too late.
>
> In Point 4, it is now claimed that certain statutes of the State, pertaining to execution sales, are void

under the Fourteenth Amendment to the Constitution. This question was not argued or presented during the trial, and is now raised too late.

The other points relied upon by petitioner seem to be based on the theory that because the Supreme Court of Arkansas resolved the issues against him, the Court took his property away from him without due process of law. This Court does not grant certiorari to correct errors of this kind, even if such error exists.

The following cases support the views expressed above:

GREAT NORTHERN RAILROAD CO. V. SUNBURST OIL REF. CO., 287 *U. S.* 358; 77 *U. S. Fed.* 360.

AMERICAN SURETY CO. V. BALDWIN, 287 *U. S.* 156; 77 *U. S. Fed.* 231.

GODCHAUX CO. V. ESTOPINAL, 251 *U. S.* 179; 64 *U. S. Fed.* 213.

MISSOURI EX. REL. MISSOURI INS. CO. V. GELMER, 281 *U. S.* 313; 74 *U. S. Fed.* 870.

RADIO STATION WOW, INC. V. JOHNSON, 326 *U. S.* 120; 89 *U. S. Fed.* 2092.

IV.

STATEMENT OF THE CASE

This suit was filed in the Chancery Court of Columbia County, Arkansas, January 13th, 1938, by Wade Kitchens against J. B. Wilson, to cancel four deeds executed by the Sheriff, pursuant to an execution sale held on July 24th, 1936. This was a collateral attack on the execution sale. It was contended that the sale was void for various reasons set out in the complaint, the principal reasons being:

(a) That the sale was held after three o'clock in the afternoon contrary to the statute fixing the hours for holding execution sales;

(b) Because the lands were sold in lots which included a number of separate tracts;

(c) Because certain tracts of land which were included in the sale did not belong to Wade Kitchens;

(d) Because of certain erroneous descriptions;

(e) Because the Sheriff failed to properly return the execution;

(f) Because the Sheriff failed to file copies of the certificate of purchase in the office of the Clerk; and

(g) Because it was contended that Kitchens and Wilson were partners and this was a partnership debt and that one partner could not purchase the lands of the other partner at the execution sale.

The case was not tried until February, 1948. In the meantime, J. B. Wilson died and the case was revived against his heirs.

The execution was sued out by R. S. Warnock, the judgment creditor, on June 2nd, 1936 to satisfy a judgment recovered on February 14th, 1933, in the Columbia County Circuit Court against Wade Kitchens and J. B. Wilson on a promissory note which they had signed as joint makers.

The execution was levied on lands belonging to Wade Kitchens individually and on lands belonging to J. B. Wilson individually and on several tracts which Wilson and Kitchens owned as tenants in common. Notices were posted on the lands and the sale was advertised in a newspaper published in Columbia County, Arkansas. Wade Kitchens and his son, Hampton Kitchens, both lawyers, knew about the impending sale but neither attended the sale. Wade Kitchens attended a speaking engagement in his race for Congress and his son attended a barbecue at some other place. Mr. Kitchens' stenographer, at his direction, attended the sale to report what transpired.

Because of the depression and because Wade Kitchens' lands were mortgaged for sums approaching their full value, his equity in the lands that were sold under the execution was of slight undeterminable value.

Under the State statute, Kitchens had one year to redeem from the execution sale. This could be accomplished by depositing with the Clerk of the Circuit Court the amount for which the lands sold, plus interest and costs. (Ark. Statutes 1947, Sec. 30-440 and Sec. 30-441) Kitch-

ens failed to exercise his right to redeem during the one year period, his excuse being he could not find out who was the purchaser at the sale, what the lands were sold for or anything about the sale. He admitted that he did not inquire of persons who were in a position to give him this information. If Kitchens thought the sale was void because of irregularities he could have, during the time for redemption, filed a petition in the Circuit Court out of which the execution was issued to set aside the sale because of such irregularities. After the redemption period of one year expired, the lands not having been redeemed, the Sheriff executed the deeds to the purchaser. About that time oil was discovered near one of the tracts of land and a short time thereafter this suit was filed by Kitchens to cancel the execution sale and the Sheriff's deed.

The Chancellor decided the case in favor of Wade Kitchens on the theory that Kitchens and Wilson were partners and that it would be inequitable for one partner to acquire the lands of the other partner at an execution sale to satisfy a judgment on which they were both liable. The Supreme Court of Arkansas reversed the Chancellor holding that the partnership relation had long since terminated and that the parties were dealing at arms length and that this suit was a collateral attack and that Kitchens had failed to exercise either his right to redeem, or his right to attack the sale for irregularities during the time allowed for redemption.

In the progress of the trial in the Chancery Court, it was recognized that there would have to be an accounting of some kind between the parties and no effort was made to develop this aspect of the case during the trial; the pri-

mary issue involved in the trial being the question of whether the execution sale should stand or fall.

The Supreme Court of Arkansas has only determined the validity of the execution sale and the case has been remanded to the Chancery Court for further proceedings in the nature of an accounting and to work out the equities in connection with the lands that were involved in the T. P. Lester mortgage, which Wade Kitchens undertook to redeem from Mrs. Mary Bird.

ARGUMENT

The only grounds for review urged by petitioner are based on that part of Section 1 of the Fourteenth Amendment to the Federal Constitution, which provides that no State shall deprive any person of property without due process of law.

The argument is made that the petitioner has been deprived of his property without due process of law on account of the decision of the Supreme Court of the State of Arkansas which has upheld the proceeding under which petitioner's lands were sold under execution. A feeble attempt is made to justify this application on the ground that the construction placed by the Supreme Court on certain State statutes, which pertain to execution sales, has the effect of depriving the petitioner of his property without due process.

Actually, there is no Federal question involved in this case. It has been said that the due process clause does not take up the laws of the several states and make all laws

pertaining to them constitutional questions, nor does it enable the United States Supreme Court to review the decisions of the state courts upon question of state law. *ENTERPRISE IRRIGATION DIST. v. FARMER'S MUT. CANAL CO., NEB.* 1917, 37 *S. Ct.* 318; 243 *U. S.* 157; 61 *L. Ed.* 644; *McCAUGHEY v. LYALL, CAL.* 1912; 32 *S. Ct.* 602; 224 *U. S.* 558; 56 *L. Ed.* 883; *WATERS-PIERCE OIL CO. v. TEXAS, TEX.* 1909; 29 *S. Ct.* 220; 212 *U. S.* 86; 53 *L. Ed.* 417.

The Constitution does not guarantee that decisions of state courts shall be free from error, or require that pronouncements shall be consistent. *WORCESTER COUNTY TRUST CO. v. RILEY, MASS.* 1937, 58 *S. Ct.* 185; 302 *U. S.* 292; 82 *L. Ed.* 268.

In making the foregoing statement we do not intend to imply that the decision of the Supreme Court of Arkansas is erroneous, but we do make the point that so far as this case is concerned the Supreme Court of Arkansas was merely applying local law, both statutory and common law, to the decision of a matter involving property rights.

A State court cannot be deemed guilty of a violation of its obligation under the constitution because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction. It must be accepted as a correct exposition of the law of the State, common, statutory and constitutional, and the only inquiry can be, does the state law, as applied, afford due process? In re *CONVERSE, MICH.* 1891; 11 *S. Ct.* 191; 137 *U. S.* 624; 34 *L. Ed.* 796. See, also, *HOWARD v. KENTUCKY, KY.* 1906; 26 *S. Ct.* 189; 200 *U. S.* 164; 50 *L. Ed.* 421. *QUEENS LAND, etc.,*

CO. v. KINGS COUNTY TRUST CO., D. C. N. Y. 1918; 255 *F.* 222; affirmed, 1920; 40 *S. Ct.* 395; 252 *U. S.* 572; 64 *L. Ed.* 722; *GRAY v. HALL*, 1928, 265 *P.* 246; 203 *Cal.* 306.

Due process means, due procedure and an opportunity to be heard. *ANDERSON NATIONAL BANK v. LUCKETT*, 321 *U. S.* 232; 88 *L. Ed.* 692; 151 *ALR* 824.

Under the guise of arguing a federal question, the petitioner has argued the same question of law and the same questions of fact that were presented in the Supreme Court. For example, under Point "C", referred to as Point Two in the Petition for Rehearing, it was argued, that there was no judgment for the satisfaction of which the lands could have been sold. The Supreme Court of Arkansas evidently adopted a different view and considered that the judgment had not been satisfied at the time of the execution sale.

In order to answer all of the points argued by petitioner in which he has adverted to the irregularities complained of in the conduct of the execution sale, we would have to reargue the whole case along the same lines upon which it was argued in the Supreme Court of Arkansas. We do not understand that this Court is concerned with an argument of that kind. Mere reference to all of these questions is sufficient to show that the consideration of these questions was a part of the due process of law which was afforded to the petitioner by the courts of Arkansas.

Petitioner takes issue with the Supreme Court of Arkansas because that Court held that Kitchens should have

taken advantage of his right to redeem within the statutory period. There are very good reasons why the time for redemption should be limited and the courts generally recognize that an execution sale may be set aside by the court issuing the execution during the redemption period, for mere irregularities but if the judgment debtor waits until after the time for redemption has expired and after the sheriff has executed his deed to the purchaser, to attack the sale, his attack would then be a collateral attack; and in that case the sale will not be set aside for mere irregularities.

This case was decided by the Supreme Court of Arkansas on correct principles of law and all of the questions argued by petitioners were considered. The procedure was adequate to afford petitioner the equitable relief which he sought if the court had concluded that he was entitled to such relief.

The statement in petitioner's argument that his property which was sold for $4,750.00, had a value of $60,000.00, is not correct. All of that property was already covered by mortgages aggregating over $30,000.00, and the value of $60,000.00 was Mr. Kitchen's estimate at prices which were far greatly in excess of the actual value of the property at the time it was sold. The real reason Kitchens did not redeem was probably because he did not consider that he had any equity that was worth redeeming. He did not file this suit until oil was discovered adjoining one of the tracts that had been sold at the execution sale.

It is significant that petitioner, having based his suit originally upon the theory that Wilson was his partner and

was precluded from purchasing at the sale for that reason, has now shifted his ground to a position where he is complaining that the Supreme Court of Arkansas has taken his property from him without due process of law.

The petition should be denied because there is no federal question involved.

Respectfully submitted,

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